IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.M.JOSEPH

FRIDAY, THE 27TH APRIL 2007 / 7TH VAISAKHA 1929

OP.No. 15012 of 1998(K)

PETITIONER:

P.K.CHANDRAMOHAN, KARTHIKA,
HOUSE NO.EWAS 806, GANDHI NAGAR,
COCHIN.

BY ADV. SRI.PAULSON C.VARGHESE

RESPONDENTS:
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1. **STATE OF KERALA, REP.BY THE SECRETAR**
   TO GOVERNMENT , LABOUR & REHABILIATION (A) DEPT.,
   TRIVANDRUM.

2. **THE MANAGER, M/S. MIRAJ MARKETING CO.PVT. LTD.,**
   ARCHITECTS CHAMBER, 39/3507 OFF
   M.G.ROAD, RAVIPURAM 682 016, COCHIN - 16

BY ADV. SRI.C.ANIL KUMAR
GOVERNMENT PLEADER
SRISHIJU VARGHEESE
SRI.P.F.THOMAS (SR.)

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 04/10/2006, THE COURT ON 27.04.2007 DELIVERED THE FOLLOWING:

ORDER ON CMP. NO.26630/1998 IN OP. NO.15012/1998

DISMISSED

27.04.2007 **SD/- K.M.JOSEPH , JUDGE**

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1:- COPY OF THE LETTER OF APPOINTMENT ISSUED TO THE PETITIONER DT.6.8.91.

EXT.P2:- COPY OF THE REPRESENTATION DT.18.6.95 SUBMITTED BY THE PETITIONER.

EXT.P3:- COPY OF THE MEMO DT.20.6.95 ISSUED TO THE PETITIONER.

EXT.P4:- COPY OF THE LETTER DT.21.7.95 ISSUED TO THE PETITIONER.

EXT.P5:- COPY OF THE LETTER DT.26.7.95 ISSUED BY THE PETITIONER.

EXT.P6:- COPY OF THE ORDER DT.21.3.97 ISSUED TO THE PETITIONER.

RESPONDENTS EXHIBITS

EXT.R2(a)l:- COPY OF THE FORM 19 UNDER THE E.P. SCHEME SUBMITTED BY THE PETITIONER.

EXT.R2(b):- COPY OF THE FROM 10B (FPF) SUBMITTED BY THE PETITIONER.

EXT.R2(c):- COPY OF THE LETTER NO.KN/PF/RC-1'S SECTT/1(2) 130/06-07 SENT BY THE R.P.F. COMMISSIONER – I, BANGALORE REGION, KARNATAKA TO THE 2ND RESPONDENT.

/TRUE COPY/

tss

K.M.JOSEPH, J.

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O.P. No.15012 OF 1998

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Dated this the 27th day of April, 2007

JUDGMENT

Petitioner challenges Ext.P6. Case of the petitioner in brief is as follows:

He was appointed as a Security man in 1991 and upon completion of probation he was confirmed in service. Even though memo was issued to him and he was placed under suspension, he admitted the guilt and apologised, which apology being accepted, suspension was revoked and further disciplinary proceedings dropped. But while he was reinstated he was transferred as Night Security. He filed Ext.P2 representation pointing out the difficulties and requesting a posting at the original place. While so, he received Ext.P3 memo dated 20.6.1995, wherein it is stated that it is reported by the officials that he has failed to report for duty on 19.6.1995 as directed in the memo dated 16.6.1995. Violation of terms and conditions was alleged. Explanation was sought for. It is stated that failure to do so will be treated as non-acceptance of transfer and be deemed as resignation from the

Company. Petitioner thereafter received Ext.P4 letter dated 21.7.1995. In it a cheque for Rs.1964.35 was enclosed. It is stated that the said amount is in full and final settlement of the dues from the Company. It is the petitioner's case that without knowing the legal implications the cheque was encashed by the petitioner. But when he came to know that the amount was towards settlement of his dues, he sent Ext.P5 letter dated 26.7.1995 and returned the amount covered by the cheque by a cheque. Petitioner requested the second respondent to allow him to attend the office from 26.7.1995. Dispute was raised. Failure report was submitted by the District Labour Officer. The State Government however by Ext.P6 declined to make reference. In Ext.P6 it is stated that there is a failure report and Government examined the matter in detail and found that the workman failed to report for duty and received all dues including Provident Fund from the management without any hesitation and therefore the matter does not merit reference.

2. Counter affidavit has been filed by the second respondent interalia stating as follows:

The petitioner committed several acts of misconduct. Warnings

did not yield result. He had given apology and undertakings. When he was shifted for night duty he did not report. He expressed intention not to continue and left service. He submitted application for settlement of provident fund. His salary and dues upto the date of his resignation and leaving the service was paid to him, which was accepted by the petitioner. Even though Ext.R2(a) and R2(b) are purported to be marked in the counter affidavit, they were not marked and later the second respondent filed a petition producing Exts.R2(a) to Ext.R2(c). Case of the second respondent is that the petitioner left the service of free will and thereafter he back tracked. Government considered the entire matter and took the decision.

3. Petitioner filed reply affidavit denying the allegations. He stated that he did not receive any money from the Provident Fund and he has not applied for settlement of accounts as alleged by the respondent. Petitioner has filed an additional reply affidavit dated 16.3.2006 denying the signature in the documents. It is stated that the said documents are unsigned, incomplete and undated. Ofcourse it is thereafter that the second respondent has produced Exts.R2(a), R2(b)

and R2(c). Ext.R2(c) is issued by the Regional Provident Fund Commissioner-1 to the respondent Company. Therein the details of the payment made to the credit of member's S.B.Account maintained at Dena Bank, M.G.Road, Ernakulam are furnished.

4. Learned counsel for the petitioner Sri.Paulson C.Varghese would contend that Ext.P6 is unsustainable in law. He would contend that powers of the Government are administrative. It is not open to the Government to go into the merits of the matter and it is for the Labour Court or Tribunal to do the actual adjudication, he contends. As long as dispute is not frivolous or unduly delayed, Government has absolutely no authority to decide the matter as was done in Ext.P6, he submits.

5. He relied on certain decisions. In **Telco Convoy Drivers Mazdoor Sangh v. State of Bihar** (1989(2) L.L.J. 558) the Apex Court held as follows:

> "There can be no doubt that the appropriate Govt. was not justified in deciding the dispute. Where the dispute is whether the persons raising the dispute are workmen or not, the same cannot be decided by the

> appropriate Govt. in exercise of its administrative function under Sec.10(1) of the Industrial Disputes Act. As has been held in M.P.Irrigation Karamchari Sangh v. State of Madhya Pradesh (1985-1-LLJ-519) there may be exceptional cases in which the State Govt, may, on a proper examination of the demand, come to a conclusion that the demands are either perverse or frivolous and do not merit a reference. The Govt. should be very slow to attempt an examination of the demand with a view to declining reference and the courts will always be vigilant whenever the Govt. attempts to usurp the powers of the Tribunal for adjudication of valid disputes, and to allow the Govt. to do so would be to render Sec.10 and Sec.12(5) of the Act nugatory."

He also relied on the decision of the Apex Court reported in **Sharad Kumar v. Govt. of NCT of Delhi** (2002(2) L.L.J. 275. Therein there was a refusal to refer the dispute to the Industrial Tribunal/Labour Court on the sole ground that the employee was not a workman. The court held as follows:

> "Testing the case in hand on the touchstone of the principles laid down in the decided cases we have no hesitation to hold that the High Court was clearly in error in

confirming the order of rejection of reference passed by the State Government merely taking note of the designation of the post held by the respondent i.e. Area Sales Executive. As note earlier determination of this question depends on the types of duties assigned to or discharged by the employee and not merely on the designation of the post held by him. We do not find that the State Government or even the High Court has made any any attempt to got into the different types of duties discharged by the respondent with a view to ascertain whether he came within the meaning of Section 2(s) of the Act. The State Government, as noted earlier, merely considered the designation of the post held by him which is extraneous to the matters relevant for the purpose. From the appointment order dated April 21/22, 1983 in which it enumerated certain duties which the appellant may be required to discharge it cannot be held therefrom that he did not come within the first portion of Section 2(s) of the Act. We are of the view that determination of the question requires examination of factual matters for which materials including oral evidence will have to be considered. In such a matter the State Government could not arrogate to itself the power to adjudicate on the question and hold that the respondent was not a workman within the meaning of Section 2(s) of the

> Act, thereby terminating the proceedings prematurely. Such a matter should be decided by the Industrial Tribunal of Labour Court on the basis of the materials to be placed before it by the parties. Thus the rejection order passed by the State Government is clearly erroneous and the order passed by the High Court maintaining the same is unsustainable."

The decision reported in **Nar Singh Pal v. Union of India** ((2000) 3 SCC 588) was the case of a casual labourer in the Telecom Department. I do not think that the principle enunciated therein, namely, that there cannot be waiver nor estoppel against exercise of fundamental right in the context of the acceptance of retrenchment compensation can avail the petitioner.

6. Sri. P.F.Thomas, Senior Counsel appearing on behalf of the second respondent would reiterate the contentions in the counter affidavit and he would also point out the decision reported in **State of Bombay v. K.P.Krishnan** (AIR 1960 SC 1223). He would further contend that this is a clear case where petitioner is disentitled to any relief. He referred me to Sections 12(4) and 12(5) of the Industrial Disputes Act, 1956. He would submit that parties held talks. The

report of the officer would contain all details and it was on a consideration of the said report the Government arrives at a decision to refer or not to refer and Government has discretion in the matter, he contends. In **State of Bombay's Case** the court inter alia held as follows:

> "Section 12(5) with which we are concerned in the present appeals provides that if, on a consideration of the report referred to in sub-s.(4), the appropriate Government is satisfied that there is a case for reference to a Board, Labour Court, Tribunal or National Tribunal, it may make such reference. Where the appropriate Government does not make such a reference, it shall record and communicate to the parties concerned its reasons therefor. This section requires the appropriate Government to consider the report and decide whether a case for reference has been made out. If the Government is satisfied that a case for reference has been made out, it may make such reference. If it is satisfied that a case for reference has not been made out, it may not make such a reference; but in such a case it shall record and communicate to the parties concerned its reasons for not making the reference which in the context means its reasons for not being satisfied that there is a case for reference."

It was also held as follows:

> "Even if the appropriate Government may be acting under S.12(5) the reference must ultimately be made under S.10(1). Section 12(5) by itself and independently of S.10 (1) does not confer power on the appropriate Government to make a reference. While deciding whether a reference should be made under S.12(5) it would be open to the

> appropriate Government to consider, besides the report of the Conciliation Officer, other relevant facts which may come to its knowledge or which may be brought to its notice."

In **Canara Bank Staff Union v. Union of India** (1998(1) K.L.T. 432) His Lordship Justice A.R. Lakshmanan, as His Lordship then was held as follows:

> "S.10 read with S.12(3) of the Act confers very wide discretion on the appropriate Government either to refer or to refuse to refer an industrial dispute. In this case, the Government have bonafide exercised its discretion and had decided to decline the reference. While passing the administrative orders under S.12(5) of the Act the Government is not prevented from considering the merits of the dispute raised by the workers prima facie. S.12(5) of the Act does not make it obligatory on the part of the Government to make reference of all disputes raised by the workmen automatically. It has got discretion to refer or not to refer the dispute. Therefore, while considering the prima facie case on merits the Government discloses the reasons relevant to the dispute. This, in my opinion, would not tantamount to adjudication as alleged by the petitioner union."

7. I do not think that petitioner should be granted relief in this case. No doubt, it is true that Government is not expected to decide the matter as it were treating itself as a court. But nonetheless it has a discretion. The discretion extends to examining the case prima facie as to the facts also. Government found that the petitioner had accepted the amount due as provident fund dues. It is clear that the petitioner had actually encashed the cheque sent vide Ext.P3. No doubt he sent Ext.P4 letter purporting to send back the money. There is no counter affidavit to the petition producing the document including Ext.R2(c). Ext.R2(c) was issued by the Provident Fund Commissioner giving details of payment made to the petitioner in his Bank Account. No doubt learned counsel for the petitioner would contend that amount of provident fund is petitioner's money. Proceeding on the basis that he has taken the money, it cannot improve matters for the management, he contends. In the facts of this case, I feel that the Government was not convinced that it was expedient to make a reference. Petitioner has not made out a case for extending the indulgence to him under the discretionary jurisdiction. It is to be noted that petitioner has set up a

case that he has not received any amount towards provident fund in his additional reply affidavit. I do not think that such a person should be extended the aid of this court when documents of an unimpeachable nature unerringly point to the falsity of his contention in this regard. I would decline jurisdiction under Article 226 of the Constitution and it is dismissed.

(K.M. JOSEPH, JUDGE)

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K.M.JOSEPH, J.

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O.P. No. 15012 OF 1998

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JUDGMENT

27.4.2007.